

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

IMMANUEL CHRISTIAN PRICE,
Plaintiff,
v.
Z. IGBAL, et al.,
Defendants.

No. 2: 20-cv-1439 TLN KJN P

ORDER and FINDINGS AND RECOMMENDATIONS

Plaintiff, a state prisoner, proceeds without counsel and with a civil rights action pursuant to 42 U.S.C. § 1983. Pending before the court is defendants' motion to revoke plaintiff's in forma pauperis status pursuant to 28 U.S.C. § 1915(g). (ECF No. 25.) For the reasons stated herein, the undersigned recommends that defendants' motion be denied.

Background

This action proceeds on plaintiff's July 17, 2020 complaint alleging that while he was housed at High Desert State Prison, defendants were deliberately indifferent to plaintiff's serious medical needs by refusing to continue his prescription of gabapentin, which he was previously prescribed for two years for his neuropathic pain resulting from chemotherapy treatment, and after the failure of numerous alternative pain medications. (ECF No. 1.) Plaintiff's complaint was filed while he was housed at California State Prison, Los Angeles. (ECF No. 1 at 1.)

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1 In addition to their motion to revoke, defendants filed a request for judicial notice. (ECF
2 No. 25-2.) Following the filing of defendants' motion to revoke, plaintiff was granted an
3 extension of time to file an opposition, which he filed on April 5, 2021. (ECF No. 28.) On April
4 8, 2021, defendants filed a reply. (ECF No. 29.) On April 9, 2021, plaintiff filed a request for
5 judicial notice. (ECF No. 30.)

6 Requests for Judicial Notice

7 Defendants ask the court to take judicial notice of plaintiff's court filings. A court may
8 take judicial notice of court records. See, e.g., Bennett v. Medtronic, Inc., 285 F.3d 801, 803 n.2
9 (9th Cir. 2002) ("[W]e may take notice of proceedings in other courts, both within and without
10 the federal judicial system, if those proceedings have a direct relation to matters at issue")
11 (internal quotation omitted). Defendants' request is granted.

12 On the other hand, plaintiff asks the court to take judicial notice of a document: CDCR
13 Patient Education Notes on "Peripheral Neuropathy." (ECF No. 30 at 1.) Plaintiff cites no
14 authority to support his request, but contends the document "could give the Court a better
15 understanding of plaintiff's imminent danger claim." (Id.)

16 In Lolli v. County of Orange, 351 F.3d 410 (9th Cir. 2003), the Ninth Circuit took judicial
17 notice of the facts that diabetes is a serious medical condition that can produce harmful
18 consequences. These are general medical facts that are not subject to reasonable dispute.
19 Similarly, in the present case, this court can take judicial notice of facts describing peripheral
20 neuropathy which support plaintiff's claim that peripheral neuropathy is a serious medical need.
21 This court cannot, however, take judicial notice of the symptoms or treatment contained therein,
22 because different people have different symptoms, and the treatment for such condition is
23 disputed in this action. This court may not take judicial notice of a fact that is in dispute.
24 Therefore, plaintiff's request for judicial notice is partially granted, solely as to the fact that
25 peripheral neuropathy constitutes a serious medical need. (ECF No. 30.)

26 Governing Standards

27 The Prison Litigation Reform Act of 1995 ("PLRA") permits a federal court to authorize
28 the commencement and prosecution of any suit without prepayment of fees by a person who

1 submits an affidavit indicating that the person is unable to pay such fees. However, a prisoner
2 may not proceed in forma pauperis

3 if the prisoner has, on 3 or more prior occasions, while incarcerated
4 or detained in any facility, brought an action or appeal in a court of
5 the United States that was dismissed on the grounds that it is
6 frivolous, malicious, or fails to state a claim upon which relief may
be granted, unless the prisoner is under imminent danger of serious
physical injury.

7 28 U.S.C. § 1915(g).

8 Such rule, known as the “three strikes rule,” was “designed to filter out the bad claims
9 [filed by prisoners] and facilitate consideration of the good.” Coleman v. Tollefson, 575 U.S.
10 532, 535 (2015) (quoting Jones v. Bock, 549 U.S. 199, 204 (2007)). If a prisoner has “three
11 strikes” under § 1915(g), the prisoner is barred from proceeding in forma pauperis unless he
12 meets the exception for imminent danger of serious physical injury. See Andrews v. Cervantes,
13 493 F.3d 1047, 1052 (9th Cir. 2007). To meet this exception, the complaint of a “three-strikes”
14 prisoner must plausibly allege that the prisoner was faced with imminent danger of serious
15 physical injury at the time his complaint was filed. See Williams v. Paramo, 775 F.3d 1182, 1189
16 (9th Cir. 2015); Andrews, 493 F.3d at 1055.

17 Discussion

18 In the motion to revoke, defendants argue that plaintiff had at least three prior actions
19 dismissed because they failed to state a claim, or were frivolous or malicious. Indeed, as noted by
20 defendants, plaintiff admits in his complaint that before he filed the instant action he sustained at
21 least three strikes under 28 U.S.C. § 1915(g). (ECF No. 1 at 11.) The Court of Appeals for the
22 Ninth Circuit has twice deemed plaintiff a three strikes litigant: Price v. Wright, No. 18-16682
23 (9th Cir. Dec. 19, 2018), and Price v. Lamb, No. 18-16681 (9th Cir. Dec. 20, 2018) (ECF No. 25-
24 2 at 4).

25 In addition to these two appellate cases, defendants identify the following three cases that
26 constitute § 1915(g) strikes:

- 27 1. Price v. San Diego County Jail, No. 3:16-cv-0668 (S.D. Cal. Aug. 1, 2016), dismissed
28 for failure to state a claim (ECF No. 25-2 at 20);

- 1 2. Price v. Scott, No. 3:16-cv-0411 (S.D. Cal. Feb. 28, 2017), dismissed for failure to
2 state a claim (ECF No. 25-2 at 32); and
3 3. Price v. Scott, No. 17-55336 (9th Cir. June 14, 2017), dismissed as frivolous (ECF No.
4 25-2 at 37).

5 Thus, because defendants demonstrated, and plaintiff concedes, that plaintiff sustained at
6 least three strikes under 28 U.S.C. § 1915(g), plaintiff may not proceed in forma pauperis in this
7 action unless plaintiff demonstrates that at the time he filed the instant action, he was “under
8 imminent danger of serious physical injury.” 28 U.S.C. § 1915(g).

9 Imminent Danger

10 The availability of the imminent danger exception turns on the conditions a prisoner faced
11 at the time the complaint was filed, not at some earlier or later time. See Andrews v. Cervantes,
12 493 F.3d 1047, 1053 (9th Cir. 2007). Imminent danger of serious physical injury must be a real,
13 present threat, not merely speculative or hypothetical. To meet this exception, the complaint of a
14 “three-strikes” prisoner must plausibly allege that the prisoner was faced with imminent danger of
15 serious physical injury at the time his complaint was filed. See Williams v. Paramo, 775 F.3d
16 1182, 1189 (9th Cir. 2015); Andrews, 493 F.3d at 1055.

17 Courts have stressed that allegations of imminent danger must be supported by specific,
18 credible allegations of harm. McNeil v. United States, 2006 WL 581081 (W.D. Wash. Mar. 8,
19 2006), by allegations showing that the danger faced is “real, proximate, and/or ongoing,”
20 Andrews, 493 F.3d at 1056, and by allegations that are not speculative, Brown v. Newsom, 2019
21 WL 2387762, at *1 (E.D. Cal. June 6, 2019). Plaintiff must have shown that he faced a “genuine
22 emergency” and “time [was] pressing.” Lewis v. Sullivan, 279 F.3d 526, 531 (7th Cir. 2002).

23 Plaintiff declares that at the time he filed the instant action, he was experiencing untreated
24 neuropathic pain and mobility issues due to neuropathy which he fears will cause him to suffer a
25 fall which could cause serious injury. He also suffers severe tingling burning and numbness in
26 his hands and feet that make walking and writing difficult and at times lead to loss of balance
27 when walking or the inability to grip things with his hands. (ECF No. 28 at 7.) Plaintiff states he
28 “may be required to walk up steps or climb to a top bunk . . . and be seriously injured.” (ECF No.

1 28 at 6.) Plaintiff claims that he is still not being treated for neuropathy as Nurse Practitioner
2 Kehinde only offered medications plaintiff previously tried but were ineffective.

3 Taking plaintiff's allegations as true, plaintiff plausibly alleges that he was under
4 imminent danger of serious physical injury at the time he filed his complaint, and that such risk is
5 ongoing. Plaintiff suffers neuropathic pain, severe tingling, burning and numbness in his hands
6 and feet that make walking difficult, and make him susceptible to falling. Despite being
7 prescribed Gabapentin by doctors at three previous prisons, where such drug was demonstrated to
8 be effective, plaintiff alleges defendant Dr. Iqbal tapered plaintiff off Gabapentin solely based on
9 an April 18, 2019 memo by David Ralston, M.D., Chair of the Systemwide Pharmacy and
10 Therapeutics Committee, which urged health care providers to limit the prescription of
11 Gabapentin to the FDA approved uses, as clinically appropriate. (ECF No. 1 at 6.) Plaintiff
12 asserts that Dr. Iqbal discontinued plaintiff's Gabapentin prescription solely because it was
13 nonformulary. (ECF No. 1 at 27.) Plaintiff notes that doctor at other prisons did not cut off
14 plaintiff's prescription to Gabapentin based on such memo. In addition, plaintiff alleges that the
15 alternative medications defendants offered were previously tried but found to be ineffective.

16 Plaintiff's allegation that he suffers untreated neuropathic pain and is at risk of falling is
17 sufficient to support an inference of imminent danger of serious physical jury. See Womack v. H.
18 Tate, 2020 WL 2020 WL 3799205 (9th Cir. May 19, 2020) ("the district court improperly denied
19 appellant's request to proceed in forma pauperis because appellant made plausible allegations that
20 he was "under imminent danger of serious physical injury" at the time he lodged the complaint,
21 28 U.S.C. § 1915(g), including that appellant was in excruciating pain and that defendants had
22 discontinued appellant's pain medication and mobility vest ordered by a doctor at the facility
23 where appellant was previously housed.")

24 Therefore, plaintiff meets the imminent danger exception described in 28 U.S.C.
25 § 1915(g), and may proceed in forma pauperis. Respondent's motion should be denied.

26 Accordingly, IT IS HEREBY ORDERED that:

- 27 1. Defendants' request for judicial notice (ECF No. 25-2) is granted; and
28 2. Plaintiff's request for judicial notice (ECF No. 30) is partially granted.

1 Further, IT IS RECOMMENDED that:

2 1. Defendants' motion to revoke plaintiff's in forma pauperis status (ECF No. 25) be
3 denied; and

4 2. Defendants Rueter, Iqbal and Gates be directed to file a responsive pleading within
5 twenty-one days.

6 These findings and recommendations are submitted to the United States District Judge
7 assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within fourteen days
8 after being served with these findings and recommendations, any party may file written
9 objections with the court and serve a copy on all parties. Such a document should be captioned
10 "Objections to Magistrate Judge's Findings and Recommendations." Any response to the
11 objections shall be filed and served within fourteen days after service of the objections. The
12 parties are advised that failure to file objections within the specified time may waive the right to
13 appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

14 Dated: July 9, 2021

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16 KENDALL J. NEWMAN
17 UNITED STATES MAGISTRATE JUDGE

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